No. 19-67

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EVELYN SINENENG-SMITH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent provides no viable defense of the Ninth Circuit's decision to strike down 8 U.S.C. 1324(a)(1)(A)(iv) as unconstitutionally overbroad. Respondent does not dispute that the terms "encourage" and "induce" can refer solely to facilitation and solicitation of illegal activity, which this Court has long recognized to be constitutionally proscribable, or that statutes should be construed to avoid constitutional problems. Respondent also provides no evidence that, before the court of appeals' decision here, Section 1324(a)(1)(A)(iv) or its predecessors were ever understood to be directed at protected speech. Respondent recognizes that her case involves no such speech; indeed, neither respondent nor her amici have identified a single actual prosecution premised on protected speech in the history of the prohibition. And the longstanding, continuing, and public engagement of her amici in the very speech and other activities that they claim that Section 1324(a)(1)(A)(iv)

would chill belies that any such chilling has occurred, or would occur if the Court confirms the government's narrow, conduct-focused, and wholly constitutional construction of the provision.

A. Section 1324(a)(1)(A)(iv) Is A Prohibition On Facilitating Or Soliciting Unlawful Conduct, Not A Ban On Speech

As the government's opening brief demonstrates (at 18-28), Section 1324(a)(1)(A)(iv) employs familiar criminal-law terms to prohibit the facilitation or solicitation of certain unlawful immigration activity. Respondent's characterization (Br. 14) of the provision as a self-evidently unconstitutional effort by Congress to ban "wide swaths of protected speech" largely just repeats the Ninth Circuit's errors.

1. Respondent does not dispute (*e.g.*, Br. 20-21) that the terms "encourage" and "induce" are commonplace in criminal statutes that define facilitation and solicitation crimes. See Gov't Br. 19-22; see also, *e.g.*, 18 U.S.C. 2(a) (providing that a person who "induces" the commission of a federal crime "is punishable as a principal"); *Black's Law Dictionary* 667 (11th ed. 2019) (defining "encourage" in the criminal-law sense to mean "[t]o instigate; to incite to action; to embolden; to help. See *aid and abet*.") (capitalization and emphasis altered). She suggests (Br. 20), however, that such a definition can only be the product of the *noscitur a sociis* canon of construction. That suggestion is unsound.

The *noscitur a sociis* canon does not create new meanings for words. That "associated-words canon" is a tool for choosing among "permissible meaning[s]"—not for adopting otherwise impermissible ones. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (Scalia & Garner); see, *e.g.*, *Maracich* v. *Spears*, 570 U.S. 48, 62-63 (2013). The

application of that canon to define "encourage" and "induce" to refer to facilitation and solicitation thus confirms that such a definition is, at the very least, permissible. Accordingly, those terms can have that same ordinary criminal-law meaning in Section 1324(a)(1)(A)(iv), even in the absence of other words expressing the same concept.

Furthermore, as respondent acknowledges (Br. 31-32), a predecessor statute *did* include such additional terms as part of a longer list. See Act of Feb. 5, 1917, ch. 29, § 5, 39 Stat. 879 (prohibition against "induc[ing], assist[ing], encourag[ing], or solicit[ing]" aliens for contract labor). Congress ultimately reduced the redundancy a few years after this Court had itself used only the terms "induced or encouraged" to describe succinctly the more verbose statute. *United States* v. *Hoy*, 330 U.S. 724, 727 (1947); see Immigration and Nationality Act, ch. 477, § 274(a)(4), 66 Stat. 229 (1952). Congress's conciseness, no less than this Court's, did not convey any suggestion that the statute would be a broad ban on speech.

Instead, Congress carried forward the preexisting and typical criminal-law meanings of the terms "encourage" and "induce." See, *e.g.*, *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U.S. 229, 242-243 (2010) (interpreting phrase to accord with concept with which it had "commonly been associated" even in the absence of typical accompanying language); see also *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from another legal source, it brings the old soil with it.") (citation and internal quotation marks omitted). That interpretation is reinforced by the inclusion of both cognate terms ("encourages or induces"), rather than just one. See Scalia

& Garner 197-198 (approvingly citing decision that applied associated-words canon to a pair of disjunctive terms). Had Congress in fact understood "encourage" as broadly as respondent does (Br. 18), then "induce" would have little or no apparent work to do. See, *e.g.*, *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (citation and internal quotation marks omitted).

Even outside the criminal-law context, respondent identifies no decision of this Court interpreting either "encourage" or "induce" in an unduly speech-restrictive manner. To the contrary, this Court has used those terms to describe prohibitions that *are* constitutional. See Gov't Br. 34 (citing examples). The one case that respondent cites (Br. 18) to support a broad construction of the statutory phrase "induce or encourage"—in the context of a civil labor statute—did not construe that statute to cover protected speech. See *International Bhd. of Elec. Workers* v. *NLRB*, 341 U.S. 694, 705 (1951) ("The prohibition of inducement or encouragement of secondary [labor] pressure * * * carries no unconstitutional abridgment of free speech.").

2. Section 1324(a)(1)(A)(iv)'s additional language and statutory context further confirm that the provision is aimed at criminal conduct, not abstract advocacy. The provision requires that a defendant's activity be directed to a specific alien, not the general public. See Gov't Br. 24. And the multiple scienter requirements—knowledge or reckless disregard of the illegality of the target alien's actions, and at least general intent to "encourage[] or induce[]" those actions—reflect a narrow focus on conduct with the standard indicia of criminal complicity. *Id.* at 25 (citation omitted).

Congress's precise choice of terms—"encourage" and "induce"—itself indicates that the defendant cannot be convicted if he is indifferent to the result of his efforts. See Gov't Br. 19 (listing definitions); cf. 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2(a), at 457 (3d ed. 2018) (LaFave) (noting that exact definition of "accessory statute" may be colored by "precise combination of terms"). And, in the context of accomplice liability, this Court has treated "active[] participat[ion]" in a venture with "full knowledge of the circumstances"—which is analogous to what Section 1324(a)(1)(A)(iv) requires with respect to an alien's unlawful activity—as showing that the defendant "'wishes to bring [the venture] about.'" *Rosemond* v. *United States*, 572 U.S. 65, 76-77 (2014) (citation omitted).

Congress also placed Section 1324(a)(1)(A)(iv) alongside other provisions that are directed at conduct. The overall subparagraph, 8 U.S.C. 1324(a)(1)(A), is phrased as a single sentence that prohibits multiple criminal acts. Each of the other clauses targets conduct that directly or indirectly participates in specific activity involving aliens entering or remaining in the United States illegally, such as "transport[ing]" or "conceal[ing]" aliens. 8 U.S.C. 1324(a)(1)(A)(ii) and (iii). Section 1324(a)(1)(A)(iv) is most naturally understood as having a similar focus on conduct. See, *e.g.*, *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (explaining that the Court "'look[s] to the provisions of the whole law' to determine" a provision's meaning) (citation omitted); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (similar).

Respondent's reading of Section 1324(a)(1)(A)(iv) as a radical departure from that paradigm rests on the premise that the provision would be effectively superfluous if it were not a broad prohibition of speech. *E.g.*, Resp. Br. 25. That premise, however, is mistaken. Most tellingly, as respondent acknowledges (*ibid.*), Section 1324(a)(1)(A)(iv) is the only clause of the statute that would cover her own conduct of causing unwitting alien clients to stay in the country unlawfully—while continuing to pay her—on the false promise that paperwork she had filed would lead to lawful permanent residence. See Gov't Br. 7-9, 29. Respondent's observation (Br. 25) that her conduct also violated the prohibition on mail fraud, which appears in a different title of the federal code, see 18 U.S.C. 1341, does not suggest that Congress had no reason to ban soliciting and facilitating unlawful immigration activity. The two different prohibitions vindicate distinct interests—one in the use of the mail, the other in the enforcement of the immigration laws. Had respondent deceived her clients only in person, rather than through the mail, the mail-fraud statute would not have applied, see *ibid.*, and the government's prosecution would rest on Section 1324(a)(1)(A)(iv) alone.

Although Section 1324(a)(1)(A)(iv) does overlap with neighboring clauses of Section 1324(a)(1)(A), such overlap is a common feature of criminal statutes, see *Loughrin* v. *United States*, 573 U.S. 351, 358 n.4 (2014), and respondent in any event disregards the significant gaps in the coverage of other clauses that Section 1324(a)(1)(A)(iv) fills. For example, acts that facilitate an alien's entry but that do not involve physically accompanying the alien to the border (or arranging to have the alien accompanied), such as providing false doucments, may not fall within the clause that prohibits

"bringing" an alien to the United States. See, *e.g.*, *United States* v. *Garcia-Paulin*, 627 F.3d 127, 133-134 (5th Cir. 2010); see also, *e.g.*, *United States* v. *Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012) (limiting the scope of Section 1324(a)(1)(A)(iii)'s prohibition of "harboring"). And the separate aiding-and-abetting and conspiracy clause applies only to violations of Section 1324(a)(1)(A) *itself*, not to facilitating—much less soliciting—an alien's *own* unlawful immigration activity. See 8 U.S.C. 1324(a)(1)(A)(v); Gov't Br. 38.

Respondent thus errs in relying (Br. 20) on that separate clause's use of the phrase "aids or abets," 8 U.S.C. 1324(a)(1)(A)(v)(II), to suggest that the terms "encourage[]" and "induce[]" in Section 1324(a)(1)(A)(iv) are directed at speech. When Congress added the aiding-and-abetting subclause in 1996, it had no reason to revise the decades-old language of Section 1324(a)(1)(A)(iv), which —unlike the new provision—covered solicitation as well. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, Tit. II, Subtit. A, § 203(b)(1), 110 Stat. 3009-565. As with the other post-1952 amendments that respondent cites (Br. 32), the 1996 amendment expanded the range of *conduct* covered by the provision. See, *e.g.*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112(a), 100 Stat. 3381-3382 (eliminating a willfulness requirement); cf. Gov't Br. 6-7. It did not suggest any shift toward banning abstract advocacy.

3. To the extent that Section 1324(a)(1)(A)(iv) would be amenable to multiple different interpretations, respondent fails to justify the Ninth Circuit's adoption of a constitutionally destructive one. Federal courts construe federal statutes to avoid, not invite, constitutional difficulties. See Gov't Br. 26-28. Particularly in

the context of a First Amendment overbreadth challenge like this one, where the challenged provision may legitimately be applied to respondent and many others, the federal courts have not only "the power to adopt narrowing constructions," but "the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos* v. *Barry*, 485 U.S. 312, 330-331 (1988); see also, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

Respondent briefly attempts to defend the Ninth Circuit's disregard of the constitutional-avoidance canon, suggesting that it would be "implausible," Resp. Br. 34 (citation omitted), to interpret the terms "encourage" and "induce" to refer to facilitation and solicitation rather than pure advocacy. But she herself elsewhere acknowledges (Br. 20-21, 31) that the *noscitur a sociis* canon would alone be enough to support the narrower interpretation. And if one canon can do that, so can another. Respondent provides no basis for concluding that the constitutional-avoidance canon—especially when combined with the antisurplusage canon, see p. 4, *supra* —is somehow weaker than the *noscitur a sociis* canon. Indeed, she does not identify any statute that uses the terms "encourage" and "induce" in a constitutionally self-defeating way. No sound reason exists to interpret them that way here.

B. Section 1324(a)(1)(A)(iv) Is Not Unconstitutionally Overbroad

As the government explained in its opening brief (at 28-36), the Ninth Circuit's interpretation of Section 1324(a)(1)(A)(iv) as a direct ban on expression was a

sharp and unjustified departure from how that provision has historically been understood and applied. Respondent does not dispute the validity of the statute as applied to her. See Gov't Br. 37. Invalidation on overbreadth grounds, however, requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The submissions of respondent and her amici—who have long engaged in the very activities that they claim the statute would chill—demonstrate just how unrealistic any danger is here.

1. The government's opening brief illustrated (at 29-30) the breadth of Section 1324(a)(1)(A)(iv)'s "plainly legitimate sweep," *United States* v. *Williams*, 553 U.S. 285, 292 (2008). In particular, it cataloged numerous prosecutions under that provision (or its predecessors) for conduct that, like respondent's own, enjoys no First Amendment protection. In contrast, neither respondent nor any of her amici—who bear the burden to show overbreadth that is "*substantial*, not only in an absolute sense, but also [in a] relative" sense, *ibid.*—can identify even a single example of a Section 1324(a)(1)(A)(iv) prosecution that has violated a defendant's First Amendment rights.

In support of her assertion (Br. 34) that unconstitutional prosecutions are not just "hypotheticals," respondent cites only one case, *United States* v. *Henderson*, 857 F. Supp. 2d 191 (D. Mass. 2012). But neither respondent nor the Ninth Circuit (which also cited only that case) goes so far as to claim that the full facts of *Henderson*—which involved a (non-lawyer) federal immigration official's continuing employment of an alien

whom the official knew to be unlawfully in the United States, see *id.* at 194-197—would support an as-applied First Amendment claim. See Resp. Br. 34-35; Pet. App. 24a. They instead focus on the prosecutor's response to a hypothetical in which the government allowed for the possibility that an attorney could violate Section 1324(a)(1)(A)(iv) if the attorney is actively involved in illegality. See 857 F. Supp. 2d at 203-204. As discussed below, however, the provision's potential application to attorneys is both quite limited and consistent with the criminal law's potential application to lawyers more generally. See pp. 14-15, *infra*. And neither respondent nor her amici identify any actual instances of such applications.

2. In the absence of any evidence of unconstitutional prosecutions, respondent instead suggests (Br. 18-19) that the government has urged a speech-restrictive construction of Section 1324(a)(1)(A)(iv) in the lower courts. But that suggestion relies on short, out-of-context quotations from briefs or judicial opinions in cases that did not involve any effort to criminally prosecute a defendant for protected speech. See *United States* v. *Thum*, 749 F.3d 1143, 1144-1148 (9th Cir. 2014) (defendant accompanied alien to van within the United States); *United States* v. *Lopez*, 590 F.3d 1238, 1248-1252 (11th Cir. 2009) (defendant piloted boat carrying aliens), cert. denied, 562 U.S. 981 (2010); *United States* v. *Gonzalez-Rodriguez*, 301 Fed. Appx. 874, 877 (11th Cir. 2008) (per curiam) (defendant "sat at the center console of the go-fast vessel" carrying aliens and directed efforts to evade U.S. Coast Guard), cert. denied, 556 U.S. 1195 (2009). The actual circumstances of those cases support the understanding of the statute as directed at conduct, not speech.

Contrary to respondent's repeated assertions (Br. 1, 10-11, 28-29), the litigation history of this case likewise does not show that the government interprets Section 1324(a)(1)(A)(iv) as a broad speech ban. Respondent's own fraudulent conduct—in which she facilitated unlawful residence of aliens—was not protected by the First Amendment. See Gov't Br. 7-9, 29. And when the Ninth Circuit *sua sponte* ordered amicus briefing on an overbreadth theory that respondent had not previously advanced, the government defended the statute as a prohibition on "actions that facilitate violations of the immigration laws." Gov't C.A. Supp. Br. 5.

The government likewise supported jury instructions that would have reflected the salient limitations of the statute. Although the government opposed a jury instruction that would have required a willfulness-like specific "intent to violate [the] immigration laws," J.A. 46; see J.A. 53-54, it proposed to define "[i]nduce" to include a "knowing[]" mens rea, J.A. 44; see, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 192-193 (1998) (differentiating knowledge and willfulness requirements). The final jury instructions did not adopt either proposal, but required a finding that respondent "encouraged" and "induced" the aliens' activity—terms that inherently encompass only deliberate activity, see p. 5, *supra*—as well as a finding that respondent "knew the aliens' residence in the United States was or would be in violation of the law." J.A. 117; see Gov't Br. 26 n.*.

3. Not only do respondent and her amici fail to identify any actual prosecutions of protected speech, but the amici's own examples of ongoing and public advocacy and outreach on immigration issues confirm that a speech-chilling interpretation of Section 1324(a)(1)(A)(iv) is a

strawman of the Ninth Circuit's invention. If the decision below has itself caused some legal uncertainty for amici by announcing that Section 1324(a)(1)(A)(iv) encompasses significant amounts of protected speech, a decision by this Court rejecting the Ninth Circuit's expansive construction would fully address those concerns.

Notwithstanding that Section 1324(a)(1)(A)(iv) has been on the books in substantially its current form for more than 30 years, see Gov't Br. 6-7, the activities that amici claim that the provision chills are ones in which they openly engage. See, *e.g.*, Religious Orgs. Amici Br. 5-13 (public advocacy, legal clinics, distribution of "know your rights" materials); AAJC Amici Br. 9-31 (similar). Their evident belief that they have been free to do so presumably reflects the absence of any substantial concern that Section 1324(a)(1)(A)(iv) would prohibit those activities. And they identify no demonstrated instance in which law enforcement has sought to chill such activities under Section 1324(a)(1)(A)(iv).[*]

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[*] Amicus Amnesty International claims (Br. 2-3, 9) that the government has "repeatedly" used Section 1324(a)(1)(A)(iv) to chill speech at the southern border, but its sole evidence is a 2019 letter in which the Department of Homeland Security cited that provision in the course of describing an investigation for "possibly assisting migrants in crossing the border illegally and/or as having some level of participation in" violent attacks on Border Patrol agents. Letter from Randy J. Howe, Exec. Dir., Office of Field Operations, U.S. Customs and Border Protection, to Mana Azarmi, Center for Democracy & Technology 1 (May 9, 2019) (cited at Amnesty Int'l Amicus Br. 3). Amicus San Francisco claims (Br. 2) that state and local governments have been "threaten[ed]" with enforcement of Section 1324, but those putative "threats" were not tied to Section 1324(a)(1)(A)(iv), see Pet. App. 35a n.12.

The current (and historical) state of affairs cannot be attributed simply to "*noblesse oblige*," Resp. Br. 1 (citation omitted). It is instead a result of the limitations inherent in Section 1324(a)(1)(A)(iv), to which the government has been obligated to adhere. For example, it does not violate Section 1324(a)(1)(A)(iv) for a charity or individual to provide food, water, clothing, or the like to individuals in need, even with awareness that some of them are in the country unlawfully. Generalized charity does not facilitate or solicit a particular alien's unlawful entry or residence. Nor are such charitable acts, regardless of their motivation, constitutionally protected speech that might factor into a First Amendment overbreadth analysis. See, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

As the government's opening brief explains (at 34-35), Section 1324(a)(1)(A)(iv) also does not criminalize the advocacy in which the amici engage. Public advocacy is not directed at any specific alien, as the provision requires. Gov't Br. 24. And even personalized statements of support for a specific alien's unlawful immigration activity do not constitute "encourage[ment] or induce[ment]" in violation of Section 1324(a)(1)(A)(iv), at least without evidence of more substantial assistance or incentivization. See *id.* at 35; see also *DelRio-Mocci* v. *Connolly Props. Inc.*, 672 F.3d 241, 249 (3d Cir.) (construing Section 1324(a)(1)(A)(iv) to prohibit "an affirmative act that substantially encourages or induces an alien lacking lawful immigration status to come to, enter, or reside in the United States where the undocumented

person otherwise might not have done so"), cert. denied, 568 U.S. 821 (2012).

Respondent's unsupported assertion (Br. 22) that it would be "illogical" for Section 1324(a)(1)(A)(iv) not to apply to the words "I encourage you to remain here" cannot be squared with the traditional understanding of complicity prohibitions as consistent with the First Amendment. See, *e.g.*, *Williams*, 553 U.S. at 298; cf. *id.* at 300 (construing criminal prohibition challenged under the First Amendment not to reach the statement "I encourage you to obtain child pornography"). Prohibitions on criminal complicity have long encompassed certain types of "encouragement" without creating any concern about criminalizing the more abstract sorts of exhortations that are the subject of respondent's hypotheticals. See Kent Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645, 655-656 (noting that "[e]ncouragements to commit specific crimes" have been unlawful in some form since "well before the American Revolution"). Instead, such prohibitions have been construed more narrowly, in part to avoid such concerns. See, *e.g.*, 2 LaFave § 11.1(c), at 275 ("[T]he crime of solicitation should not be extended to persons who merely express general approval of criminal acts."); *id.* § 13.2(a), at 464 n.55 (noting additional safeguards imposed by courts in accomplice-liability "cases involving, at best, encouragement of the crime").

Section 1324(a)(1)(A)(iv), like other facilitation and solicitation laws that prohibit "encouraging" or "inducing" unlawful conduct, also does not apply to good-faith legal or other professional advice. Gov't Br. 35; Pet. 18. Respondent's contrary contentions (*e.g.*, Br. 2, 34) disregard the "critical distinction," reflected in the rules of professional ethics, "between presenting an analysis of

legal aspects of questionable conduct" and "knowingly counseling or assisting a client" to break the law. Model Rules of Prof'l Conduct R. 1.2(d) cmt. 9 (2018). The issue of potential application of the criminal law to a lawyer is not unique to Section 1324(a)(1)(A)(iv), and is no reason to invalidate that provision. Rather, courts applying it should follow the usual course, under which "[t]he traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code are relevant factors for the tribunal in assessing the propriety of the lawyer's conduct under the criminal law." 1 Restatement (Third) of the Law Governing Lawyers § 8 (2000); see *ibid.* (providing that, "[i]n other respects, a lawyer is guilty of an offense for an act committed in the course of representing a client to the same extent and on the same basis as would a nonlawyer acting similarly").

This Court has treated potential infringement on the attorney-client relationship as a reason to construe a statute *narrowly*, not broadly, to avoid constitutional concerns. See *Milavetz*, 559 U.S. at 245-246 & n.5. In *Milavetz, Gallop & Milavetz, P. A.* v. *United States, supra,* for example, the Court invoked the distinction between good-faith advice and law-breaking to reject a claim that a bankruptcy provision prohibiting attorneys and other professionals "from 'advising' assisted persons 'to incur' more debt" should be read "as a broad, content-based restriction on attorney-client communications" that would present First Amendment concerns. 559 U.S. at 239, 246 (brackets omitted). The Court explained that although the provision prohibited attorneys from "instructing or *encouraging* assisted persons to take on more debt," it left them free to "'fully and candidly'" discuss the consequences of doing so. *Id.*

at 246 (citation omitted; emphasis added). The same reasoning applies here.

4. To the extent that Section 1324(a)(1)(A)(iv) could in fact be applied directly to protected speech, such scenarios would be so rare as to preclude the "last resort" remedy of "striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment." *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (citation omitted). That is particularly so here, where respondent was convicted of an offense that is far narrower than the one she challenges on overbreadth grounds.

Respondent was not convicted simply of violating Section 1324(a)(1)(A)(iv), but instead of the greater offense of violating that provision "for the purpose of commercial advantage or private financial gain," 8 U.S.C. 1324(a)(1)(B)(i). J.A. 118-121. Thus, as the government has explained (Br. 39-41), even if she were entitled to challenge her conviction by hypothesizing nonexistent prosecutions on stylized facts, they should at least be nonexistent prosecutions whose stylized facts would support all of the findings that the jury made in her case. And even the Ninth Circuit did not conclude that such a limited set of hypothetical cases would justify the "strong medicine," *Williams*, 553 U.S. at 293 (citation omitted), of overbreadth invalidation. See Pet. App. 10a n.5.

Like the Ninth Circuit, respondent seeks to expand the universe of hypothesized third parties whose rights she may invoke by characterizing the financial-gain requirement as a constitutionally trivial "sentencing enhancement." Resp. Br. 40. As the government has explained (Br. 40-41), that characterization is at odds with this Court's jurisprudence on the requirements of

pleading and proving crimes. And even if the financial-gain requirement were constitutionally inferior, that would still not justify the encroachment on normal standing requirements that respondent seeks. The overbreadth doctrine is "an exception to the traditional rule that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" *Los Angeles Police Dep't*, 528 U.S. at 39 (citation omitted). That exception should not be expanded even further to allow a criminal defendant like respondent, who would otherwise have no constitutional claim, to invoke the putative rights of someone whose conduct could not be charged or proved to a jury in the same manner as hers.

If the government were actually to try to prosecute someone under Section 1324(a)(1)(A)(iv) for protected speech, that defendant could bring an as-applied First Amendment claim. Alternatively, a person or organization whose First Amendment activity is actually chilled might attempt to satisfy the Article III and other requirements necessary to bring a preenforcement challenge to the provision. See, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 151-152 (2014) (finding preenforcement First Amendment challenge to state statute to be justiciable). But no sound reason exists to uphold the expansive (and unpreserved) invocation of third-party rights by a criminal defendant who lacks any as-applied claim of her own.

5. Respondent's repeated efforts (Br. 1-2, 16-17) to analogize Section 1324(a)(1)(A)(iv) to the statute found to be overbroad in *United States* v. *Stevens*, 559 U.S. 460 (2010), are inapt. The statute in *Stevens* targeted speech activities on its face, prohibiting the creation,

sale, or possession of "depiction[s] of animal cruelty," 18 U.S.C. 48(a) (2006). The statute had been enacted in 1999, and Stevens's own prosecution was the first to proceed to trial. See *United States* v. *Stevens*, 533 F.3d 218, 221-222 (3d Cir. 2008) (en banc), aff'd, 559 U.S. 460 (2010). The parties disputed only which visual depictions fell within the prohibition and whether those depictions merited First Amendment protection; there was no contention that the statute could be permissibly applied to plainly unprotected activities, let alone a record—like the one here—of numerous permissible applications spanning many years. See *Stevens*, 559 U.S. at 464, 473-480.

To the extent that respondent asserts that even Section 1324(a)(1)(A)(iv)'s actual scope encompasses substantial amounts of protected speech, that contention is unsound. As the government's opening brief explains (at 30-32), speech "that is intended to induce or commence illegal activities," of the sort that would be encompassed within a prohibition on facilitation or solicitation, does not enjoy First Amendment protection. *Williams*, 553 U.S. at 298. Respondent's only counterargument largely reiterates (Br. 38-40) the Ninth Circuit's effort to distinguish speech facilitating or soliciting activities that are civilly proscribed from speech facilitating or soliciting activities that are criminally proscribed. That proposed distinction is flawed. See Gov't Br. 41-44.

The Court has previously recognized in *Building Service Employees International Union* v. *Gazzam*, 339 U.S. 532 (1950), that "the presence of criminal sanctions" for the primary illegal activity is not part of the definition of this category of unprotected expression. *Id.* at 540. The petitioners in *Gazzam* had argued that

the Court's prior decision in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949)—the pathmarking decision recognizing that speech integral to illegal conduct is not protected, see *id.* at 498-499—could be distinguished because *Giboney* had involved a law with "criminal sanctions" whereas the law at issue in *Gazzam* "ha[d] no criminal sanctions," *Gazzam*, 339 U.S. at 540. This Court squarely rejected that proposed distinction, explaining that "[m]uch public policy does not readily lend itself to accompanying criminal sanctions." *Ibid.* And respondent's suggestion (Br. 39) that cases involving picketing are irrelevant overlooks that *Giboney* itself involved picketing. See 336 U.S. at 491; see also *Williams*, 553 U.S. at 297 (citing *Giboney*).

The Court reinforced the absence of a civil/criminal distinction in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), which indicated that offers to engage in crimes or civil violations may both be legitimately proscribed, see *id.* at 387-388. Respondent does not meaningfully defend the Ninth Circuit's mistaken view that *Pittsburgh Press* rested on outmoded "commercial speech" concepts. See Gov't Br. 42; Resp. Br. 39 n.1. She instead argues (Br. 39) that *Pittsburgh Press* addressed only "offers to engage in illegal transactions." As a threshold matter, it is far from clear how she would define a discrete category of "offers to engage in illegal transactions" distinct from solicitation. See *Pittsburgh Press*, 413 U.S. at 388 (using term "solicit[ation]" to describe conduct at issue). More fundamentally, she provides no reason why speech facilitating or soliciting "non-transactional" illegality would enjoy heightened First Amendment protections. And, at all events, she does not provide any

basis for concluding that Section 1324(a)(1)(A)(iv)'s potential application to her newly coined category of speech is so "substantial" as to support the Ninth Circuit's decision to strike down the provision on overbreadth grounds.

C. Respondent's Fallback Arguments Are Not Properly Before The Court And Lack Merit In Any Event

Respondent devotes a substantial portion of her brief (Br. 43-51) to arguments that the Ninth Circuit did not address. This Court should not consider those arguments for the first time now. And even if it were to do so, they are derivative of her principal contention in support of her overbreadth argument—that Section 1324(a)(1)(A)(iv) must be interpreted as a speech ban—and are similarly flawed.

1. This is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Neither the Ninth Circuit nor any other federal court of appeals has squarely considered the alternative arguments in respondent's brief. See Br. in Opp. 16 (advising the Court that "no[] * * * court of appeals" has ever addressed the alternative arguments); cf. *United States* v. *Anderton*, 901 F.3d 278, 282-283 (5th Cir. 2018) (rejecting "as applied" vagueness challenge to Section 1324(a)(1)(A)(iv) on plain-error review), cert. denied, 139 S. Ct. 1214 (2019). In accordance with the Court's usual practice, if the Court declines to accept the Ninth Circuit's overbreadth rationale—which was the exclusive ground for the decision below, see Pet. App. 39a & n.15—the Court should reverse and remand, which would allow for the consideration of other arguments to the extent that respondent has properly preserved them. See, *e.g.*, *United States* v. *Stitt*, 139 S. Ct. 399,

407-408 (2018); *Elonis* v. *United States*, 135 S. Ct. 2001, 2013 (2015).

The lack of proper preservation here provides additional reason for this Court not to become the first federal appellate court to address respondent's arguments. Notwithstanding the panel's order in this case, the Ninth Circuit generally "do[es] not consider on appeal an issue raised only by an amicus." *United States* v. *Gementera*, 379 F.3d 596, 607-608 (2004) (citation omitted), cert. denied, 546 U.S. 1031 (2005). Respondent did not herself raise an overbreadth argument or a viewpoint-discrimination argument in the district court or in her initial appellate briefing. See Gov't Br. 9, 11. As to vagueness, she argued only that the statute was "unconstitutionally vague as failing to provide fair notice," Resp. C.A. Br. 8; see *id.* at 27-34—an argument that she now disclaims, Resp. Br. 50.

2. In any event, respondent's fallback arguments are unsound. As a threshold matter, rejection of her facial viewpoint-discrimination argument would follow *a fortiori* from rejection of her overbreadth argument. Any facial First Amendment claim "must fail where the statute has a plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citation and internal quotation marks omitted). If respondent cannot show, in the context of her overbreadth argument, that "a substantial number of [Section 1324(a)(1)(A)(iv)'s] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *id.* at 449 n.6 (citation and internal quotation marks omitted), then she necessarily cannot show that the statute has no "plainly legitimate sweep" at all.

Respondent's viewpoint-discrimination argument would fail for additional reasons as well. Respondent suggests (Br. 46-47) that even if Section 1324(a)(1)(A)(iv)'s application to speech is limited to unprotected speech integral to illegal activity, it is viewpoint-discriminatory because it prohibits only speech that favors an illegal act but not speech that disfavors that same act. But that is simply an objection to the historical tradition, reflected in this Court's decisions, of categorizing speech "that is intended to induce or commence illegal activities," *Williams*, 553 U.S. at 298, as unprotected. *Any* prohibition on the solicitation or facilitation of a particular illegal act could be characterized as a ban on pro-illegality speech but not anti-illegality speech. Such prohibitions are nevertheless commonplace and constitutionally unobjectionable. See *ibid.* And nothing precludes Congress from enacting a specific prohibition on the solicitation or facilitation of particular illegal conduct that it deems especially problematic without applying that prohibition to all possible illegal conduct. See *R. A. V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) (explaining that a justification "neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class").

Respondent's vagueness argument likewise lacks merit. The premise of the argument is that the determination of whether the defendant has "encourage[d] or induce[d]" an alien's unlawful conduct, 8 U.S.C. 1324(a)(1)(A)(iv), depends on "the listener's subjective reaction." Resp. Br. 49. Respondent identifies no court that has construed the statute that way, and its operative terms are not naturally understood to turn on the

listener's subjective reaction. At a minimum, respondent has fallen short of demonstrating that the statute turns on "wholly subjective judgments"; any occasional "[c]lose cases" about whether particular conduct falls within the statute would not render it irredeemably vague. *Williams*, 553 U.S. at 306. And to the extent any doubts about the statute's reach remain after the Court's decision in this case, future decisions can provide further "clarity at the requisite level." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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